

ENTERED

APR 23 2003

K.R.W.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Sherry Timms Evans,

Debtor.

C/A No. 02-14104-W

JUDGMENT

Chapter 13

FILED
at _____ O'clock & _____ min _____ M
APR 23 2003

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (SO)

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Court enters a judgment against Professional Recovery Services of Marion, South Carolina in the amount of \$9,345.11 in actual damages as well as continuing damages and \$5,000.00 in punitive damages for its unlawful taking of and damage to Sherry Timms Evans's vehicle.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
April 23, 2003.

judgment index # 03-45

ENTERED

APR 23 2003

K.R.W.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at _____ o'clock & _____ min
APR 23 2003
BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina 29201

IN RE:

Sherry Timms Evans,

Debtor.

C/A No. 02-14104-W

ORDER

Chapter 13

THIS MATTER comes before the Court upon the Amended Motion for Emergency Hearing seeking damages and sanctions (the "Amended Motion") filed by Sherry Timms Evans ("Debtor"). In the Amended Motion, Debtor alleges that Arcadia Financial f/k/a TranSouth Financial Corporation ("TranSouth") and Professional Recovery Services of Marion, South Carolina ("Professional Recovery") unlawfully repossessed her 1997 Dodge Dakota postpetition and damaged it to such an extent that it is no longer in operable condition.¹ Because Professional Recovery filed no response or objection to the Amended Motion, Debtor moved to hold it in default.² After considering the pleadings in the matter, the evidence presented, and counsel's arguments, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52, applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7052

¹ The Court will address the allegations against TranSouth by separate order.

² Although Professional Recovery filed no response or objection to the Amended Motion, Tony Cooper, the owner / principal of Professional Recovery, appeared at the February 25, 2003 hearing and testified on behalf of TranSouth. Mr. Cooper testified that his business repossessed the vehicle, but he denied causing mechanical damages to the vehicle. He testified that the repossession assignment had been canceled by TranSouth and admitted that Professional Recovery still acted despite the cancellation.

Judgment index # 03-45¹

and 9014(c).³

FINDINGS OF FACT

1. By virtue of a retail installment contract Debtor entered on June 3, 2001, TranSouth holds a lien on the vehicle.
2. Prior to Debtor filing her Voluntary Petition, TranSouth ordered the repossession of the vehicle, and it contracted with Professional Recovery to repossess the vehicle.
3. On November 4, 2002, TranSouth canceled the repossession order with Professional Recovery.
4. Professional Recovery received the cancellation notice from TranSouth; however, the cancellation notice was not properly documented in Professional Recovery's records. Professional Recovery did not cancel its repossession efforts on behalf of TranSouth.
5. On November 26, 2002, Debtor filed her Voluntary Petition seeking Chapter 13 bankruptcy relief.
6. In the early morning hours of January 10, 2003, Professional Recovery repossessed the vehicle. The vehicle was repossessed by one of Professional Recovery's drivers who ostensibly was acting upon TranSouth's request to repossess and who had not been advised of TranSouth's cancellation notice. Professional Recovery transported the vehicle from Debtor's residence in Pageland, South Carolina to Marion, South Carolina, a distance of approximately 120 miles.
7. Upon learning of the repossession, Debtor's counsel immediately contacted TranSouth. After initially denying it had the vehicle, TranSouth admitted it had the vehicle, and it instructed

³ The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

Professional Recovery to return the vehicle to Debtor.

8. On January 10, 2003, Professional Recovery returned the vehicle to Debtor.

9. To tow the vehicle, Professional Recovery had removed the vehicle's drive shaft. When it returned the vehicle to Debtor, Debtor insisted that Professional Recovery take the vehicle to a qualified service facility and have the drive shaft reinstalled. Professional Recovery took the vehicle to a service facility, Woodberrys, in Marion, South Carolina and returned the vehicle with the drive shaft reinstalled to Debtor on January 11, 2003.

10. By January 19, 2003, the vehicle was not operating properly, and Debtor took the vehicle to the Bob Mayberry Chrysler dealership in Monroe, North Carolina for repairs.

11. Daniel Thom, Service Manager for Bob Mayberry Chrysler, testified that Debtor's vehicle required transmission repairs totaling \$3,466.55 (including his charges for testifying) as a result of having no lubricants or fluids. Mr. Thom attributed the lack of fluids to Professional Recovery's repossession and towing.

12. Debtor is unable to pay this repair bill, and the Chrysler dealership has been charging Debtor storage fees of \$5.00 per day since March 1, 2003.

13. Debtor missed three days of work as a result of the repossession and these hearings. Her total lost wages are \$182.16.

14. To prosecute this action, Debtor has incurred attorney's fees and costs of \$5,356.75.

15. Debtor also rented an automobile as an alternative means of transportation. This cost is \$74.65.

CONCLUSIONS OF LAW

Procedural Analysis

After the initial hearing and in order to minimize ongoing damages to Debtor and due to Professional Recovery's admitted involvement in the repossession, the Court expedited the amendment of Debtor's motion to add a necessary party pursuant to Federal Rule of Civil Procedure 19 and set an expedited hearing in the matter. The Court notes that, on March 11, 2003, Debtor served Professional Recovery with the Amended Motion and an Amended Notice of Motion for Emergency Hearing. At the hearing on the Amended Motion, Debtor's counsel indicated that Professional Recovery failed to file an objection or response to the Amended Motion and failed to appear at the hearing to defend against the Amended Motion. Judgment by default may be entered by a court when a defendant has failed to plead or otherwise defend a matter. See Fed. R. Civ. P. 55(a); Fed. R. Bankr. P. 9014(c). As such, it appears that it is proper for the Court to enter a default judgment against Professional Recovery.

Legal Analysis

The filing of a bankruptcy petition prohibits any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. See 11 U.S.C. §362(a)(3).⁴ Indeed, the automatic stay is effective immediately upon the filing of a bankruptcy petition, and no particular notice or formal service of process is required in order to subject a party to the stay. See 3 Alan N. Resnick and Henry J. Sommer, eds., Collier on Bankruptcy ¶362.02 (15th ed. rev. 2003). In addition, under South Carolina law, "[c]onversion is a tortious act, and may arise either by wrongful taking of chattel or by some other illegal assumption of ownership, by illegally using or misusing it, or by wrongful detention." Williams-Garrett v. Murphy, 106 F.Supp.2d 834, 839 (D. S.C. 2000). Postpetition conversion of estate property is a core proceeding within the

⁴ Further references to the Bankruptcy Code shall be by section number only.

jurisdiction of this Court. See Associates Fin. Services Co. of Texas, Inc. v. Koran Enterprises, Inc. (In the Matter of Koran Enterprises, Inc.), 61 B.R. 321, 325 (Bankr. W.D. Mo. 1986); see also Pester Refining Co. v. Mapco Gas Products, Inc. (In the Matter of Pester Refining Co.), 66 B.R. 801, 818 (Bankr. S.D. Ia. 1986); In re Haynes, No. 93-72106, 1999 WL 33592904, at *5 (Bankr. C.D. Ill. Mar. 2, 1999); Murray v. Pope (In re Murray), Nos. 90-12200, 91-1045, 1991 WL 11002462, at *3 (Bankr. S.D. Ga. Jul. 23, 1991).

Professional Recovery violated the automatic stay by repossessing Debtor's vehicle postpetition. Indeed, at the time of repossession on January 10, 2003, the automatic stay was in effect, and Professional Recovery was prohibited from performing any act to obtain possession of property from Debtor's bankruptcy estate. Further, for Professional Recovery to have any right to act against Debtor's vehicle, it would have to rely on the authority and rights of TranSouth, the lienholder on the vehicle. TranSouth denies it authorized Professional Recovery to act on its behalf, and Professional Recovery admits it acted without authority. Consequently, the repossession and taking of Debtor's vehicle was wrongful; moreover, while the vehicle was repossessed, Professional Recovery caused significant damage to its transmission system. As a result, the Court finds that Professional Recovery caused Debtor to suffer actual damages in the amount of \$9,345.11. See, e.g. Murray, at *3 (awarding damages for unlawful repossession as well as for willful violation of the automatic stay). This amount reflects Debtor's repair expenses, legal fees and costs, lost wages, and costs incurred in arranging alternative transportation. In addition, Debtor has continuing damages of renting alternative transportation, paying storage fees to Bob Mayberry Chrysler, and ongoing legal expenses. The Court also awards Debtor punitive damages in the amount of \$5,000.00. Professional Recovery engages in a line of business that is intertwined with debtor-creditor

relationships. It certainly must ensure that it acts within the lawful authority of an interest holder in the vehicle. It does a significant amount of repossession work for TranSouth as well as other creditors. Mr. Cooper testified that he was familiar with bankruptcy law and that he had previously repossessed vehicles belonging to a bankruptcy estate and that he promptly returned them upon learning of the bankruptcy. Professional Recovery should be well aware that personal property it attempts to repossess may be part of a bankruptcy estate, and it should act vigilantly to ensure that it does not violate the automatic stay or commit the tort of conversion when repossessing property. Consequently, this Court will not countenance sloppy and inadequate procedures as an excuse for violating the automatic stay and converting and damaging a debtor's property while it is part of the bankruptcy estate under the protection of the automatic stay. Therefore, based upon the totality of the circumstances, including consideration of the lowest amount necessary to deter future abuses, the Court awards Debtor punitive damages of \$5,000.00.

CONCLUSION

From the arguments discussed above, it is, therefore,

ORDERED that a judgment is entered against Professional Recovery in the amount of \$9,345.11 in actual damages as well as Debtor's continuing damages and \$5,000.00 in punitive damages for its unlawful taking of and damage to Debtor's vehicle.

AND IT IS SO ORDERED.

Columbia, South Carolina,
April 23, 2003.


UNITED STATES BANKRUPTCY JUDGE